No. 83-6230

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THEODORE HARRIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

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QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S JURISDICTION?

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PREFACE

The Petitioner, was the Appellant in the Supreme Court of Florida and the defendant in the trial court. The Respondent, The State of Florida, was the Appellee in the Supreme Court of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record attached to the present Brief of the Respondent in opposition to jurisdiction.

I

OPINIONS BELOW

The original opinion of the Supreme Court of Florida affirming the Defendant's convictions for first degree murder and sentences of death is reported at Harris v. State, 438 So.2d 787 (Fla. 1983). The West Publication Southern Reporter is the official Reporter for citation to this opinion.

II

JURISDICTION

The Defendant claims jurisdiction based upon 28 U.S.C. §1257(3).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Defendant has correctly recited relevant constitutional and statutory provisions.

IV

STATEMENT OF THE CASE

The State rejects the Defendant's Statement of Facts as incomplete. The opinion of the Florida Supreme Court reported at Harris v. State, 438 So.2d 787 (Fla. 1983) contains an accurate recitation of the relevant facts and is expressly adopted herein.

V

SUMMARY OF ARGUMENT

The Defendant's claims present no substantial federal question and the Defendant presents no special or compelling reasons for granting the writ.

VI

ARGUMENT

The Defendant contends that the Florida Supreme Court comitted six major errors of constitutional dimension its consideration of the preceding and application of the death penalty herein.

1.

LESSER INCLUDED OFFENSES.

First of all, the Defendant contends that under a Beck v. Alabama, 447 U.S. 625 (1980), the Florida Supreme Court committed constitutional error in rejecting any requirement of lesser included offenses and in excepting the Defendant's waiver of any requirement of lesser included offenses. The Defendant's argument that lesser included offenses are constitutionally required has been rejected by this Court in Hopper v. Evans, 456 U.S. 605 , 102 S.Ct. 2049 (1982). With respect to the latter contention, the opinion of the Florida Supreme Court in Harris v. State, reflects that the trial court engaged in an extensive inquiry of both defense counsel and the the Defendant as to the waiver of lesser included offenses. 438 So.2d at 795-796. Specifically, the trial court instructed the Defendant that the lesser included offenses did not have death penalty as a punishment. Id. Nevertheless, the Defendant did in fact state that he understood that fact and that he desired to waive any lesser included offenses. Id. It is of course well settled by this Court especially in its recent decisions that where the record "fairly supports" a determination of a question of fact by either a state trial court or a state appellate court, then a federal court should not intrude into such a conclusion. Cf., Wainwright v. Goode, ___U.S.___, 104 S.Ct. 378 (1983); Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982);

Sumner v. Mata, 449 U.S. 539 (1981). There is therefore no basis to assert this Court's jurisdiction in the Defendant's complaint.

2.

CONFESSION

The Defendant contends that the conflict in the evidence in the present case as to the Defendant's confession creates jursidiction for this Court under Mincey v. Arizona, 437 U.S. 385 (1978) and similar decisions. The opinion of the Supreme Court of Florida contains an extensive recitation of the relevant facts with regards to the admission of the Defendant's confession, which will not be repeated here. 438 So.2d 789-792. Specifically, in rejecting the Defendant's complaint of error the Florida Supreme Court recited that there was substantial competent evidence to affirm the trial court's finding that the Defendant's confession was voluntary:

> "Appellant next contends that the admitted facts in this record establish that the confession was involuntary. At the suppression hearing, appellant testified to his version of the police interrogation following his arrest. He claimed that he was questioned against his will for over six hours; that he was handcuffed elbow-to-wrist the entire time; that he was refused food and drink; that he was not allowed to go to the bathroom; and that he was subject to emotional and physical abuse. The police officers in charge of the investigation testified that appellant was questioned for six hours in a small room in the police station and that he was handcuffed and seated in an aluminum chair. The officers denied that the appellant had been mistreated in any way and testified affirmatively that he did not complain of discomfort or of the circumstances of his interrogation. The stenographer who took the confession and reduced it to writing for appellant's signature testified that she did not see or hear any abuse of appellant or see any evidence of such abuse. Appellant signed the written confession after pointing out and initialing one correction."

"The trial court made a detailed finding of fact in its order, addressing each of appellant's complaints. The court concluded that appellant was not beaten, threatened, or coerced in any manner and that the confession was freely and voluntarily made. Appellant did not testify at trial, but substantially all of the facts concerning the voluntariness of the confession presented during the hearing on the motion to suppress were presented to the jury through the state's witnesses. Even though the police procedure utilized in appellant's interrogation could have destroyed the admissibility of this confession, we conclude on the record as a whole that there is substantial competent evidence to affirm the trial judge and the jury in their conclusion that this confession was voluntary."

438 So.2d at 793-794.

In applying the totality of the circumstances attest, the Florida Supreme Court's opinion is therefore entirely consistent with the decisions that this court regarding the admission of a defendant's confession. See, e.g., North Carolina v. Butler, 441 U.S. 369 (1979).

3.

FRANKS V. DELAWARE CLAIM

The Defendant also claims that the decision of the Florida Supreme Court warrant the exercise of this court's jurisdiction because of its analysis of Franks v. Delaware, 438 U.S. 154 (1978) and the Defendant's claim there under that the affidavit upon which the Defendant's arrest warrant was issued contained "factual misrepresentations and inaccuracy." See 438 So.2d at 793. To the contrary, the Florida Supreme Court found that there was substantial competent evidence to support the trial court's conclusion that the Defendant's arrest was supported by probable cause and that even assuming any falsity in a portion of the matters in the arrest affidavit, the remaining contents of the affidavit were legally sufficient to support the arrest warrant. Id at 793. The State would contend that there is no error in

such an analysis in Franks v. Delaware, inasmuch as this court has already declined to review a decision on precisely the same grounds. See, Antone v. State, 382 So.2d 1205 (Fla. 1980), cert.den., 449 U.S. 913 (1980). The defendant in Antone, supra, was recently executed by the State of Florida.

4.

COMMENT ON FAILURE TO TESTIFY

During the course of the trial below, the Defendant's confession was a hotly contested issue. During the course of his closing argument, the prosecutor therefore commented to the jury that :

> "I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile unemotional self as he has this entire trial."
>
> 438 So.2d at 794.

The Florida Supreme Court rejected the foregoing comment as not being a violation of the Defendant's Fifth Amendment right. Id. at 795. The Florida Supreme Court's opinion is entirely consistent with every federal decision in which the issue has been considered. See, e.g., Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979); Bishop v. Wainwright, 511 F.2d 664 at 668 n.5 (5th Cir. 1975); Hayes v. United States, 368 F.2d 814, at 815 n.1 (9th Cir. 1966); Ketchem v. Ward, 422 F.Supp. 934 at 946 (W.D. N.Y. 1976), affirmed, 556 F.2d 557 (2d Cir. 1977). The opinion of the Supreme Court of Florida therefore does not contain either error or an opinion upon a matter which this court should decide.

5.

PROSECUTOR'S COMMENT ON DEFENDANT'S LIKELIHOOD FOR RELEASE IF JURY DID NOT IMPOSE THE DEATH PENALTY.

During the course of the prosecutor's closing argument during the penalty phase of the proceedings below, the prosecutor also commented that:

> "The defense may tell you, well, twenty-five years is a long time, twenty-five years without eligibility for parole, but I can tell you this: That twenty-seven year old defendant will be fifty-two years old. He will walk out of prison as he walked out of prison before."
>
> 438 So.2d at 797.

The Florida Supreme Court determined that the prosecutor's remark was improper but that it was not reversible error in the totality of the circumstances presented. Id. The court reasoned that the prosecutor's comment was not so severe and extensive as in previous decisions by the court. Id. Again as noted in the first issue above, the Defendant is attempting to reweigh the facts and essentially urges this court to reach a different factual conclusion than has the Florida Supreme Court. Under Goode and Mata, such a claim serves no basis for the exercise of this court's jurisdiction.

6.

CONSTITUTIONALITY OF THE DEATH PENALTY.

Contrary to the recent decision of this court in Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983) the Defendant contends that the death penalty is unconstitutional herein where one of five aggravating circumstances was found to be improper by the Florida Supreme Court and the Florida Supreme Court did not remand for resentencing. See, 438 So.2d at 797-798. There were no mitigating circumstances in the present case. Id. This argument is plainly not a basis to a assert

this court's jurisdiction in the face of Barclay v. Florida. See, also, Zant v. Stephenson, ___U.S.___, 103 S.Ct. 2733 (1983).

VII

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 9th day of March, 1984, at Miami, Dade County, Florida.

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THEODORE HARRIS,	)	
Petitioner,	)	
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THE STATE OF FLORIDA,	)	
Respondent.	)	
_____	)	

I HEREBY CERTIFY, that three true and correct copies of the Brief of Respondent in Opposition to Jurisdiction were caused to be served by United States Mail, First Class delivery pre-paid upon JOSEPH BEELER, 300 Executive Plaza, 3050 Biscayne Blvd., Miami, Florida 33137 on this 9th day of March, 1984.

Pirkey H Brill for
CALVIN L. FOX, Esquire
Assistant Attorney General

/sah